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IN THE

Supreme Court of the United States

October Term, 1963

No. 555

GENERAL INSTRUMENT CORPORATION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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To the Honorable Earl Warren, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

General Instrument Corporation (the "Employer") petitions for a writ of certiorari to review a decree of the Court of Appeals for the Fourth Circuit enforcing an order of the National Labor Relations Board (the "Board") directing the Employer to bargain with the International Union of Electrical, Radio and Machine Workers, AFL-

CIO (the "I. U. E."). The order is based on an earlier determination by the Board that certain technical employees of the Employer constitute a unit appropriate for purposes of collective bargaining under Section 9(b) of the National Labor Relations Act, as amended (the "Act"). 61 Stat. 136, 29 U. S. C. 151, *et seq.*

Opinions and Orders Below

The opinion of the Court of Appeals (App. A, *infra*, pp. 15a-20a) is reported at 319 F. 2d 420. The Board's decision and order to bargain (App. A, pp. 21a-29a) is reported at 140 N. L. R. B. No. 6. The Board's decision on review, order and direction (App. A, pp. 32a-34a) and its order denying reconsideration (App. A, pp. 30a-31a), are unreported. The Regional Director's decision and direction of elections (App. A, pp. 35a-47a) is unreported.

Jurisdiction

The decree of the Court of Appeals (App. A, pp. 13a-14a) was entered on June 3, 1963. Its order denying rehearing (App. A, p. 1a) was entered on July 17, 1963. The jurisdiction of this Court is invoked under Sections 1254(1) and 2101 of the Judicial Code. (Act of June 25, 1948, c. 646, secs. 1254(1), 2101; 62 Stat. 928, 961; 28 U. S. C. 1254(1), 2101.)

Questions Presented

1. Whether the Board acted arbitrarily and improperly exercised its duty under Section 9(b) of the National Labor Relations Act to determine appropriate bargaining units, when, in a case before it on the petition of a union, it made a different unit determination from that which it would have made were the same case before it on the petition of an employer.

2. Whether the Board, in replacing its Regional Director's finding that technical and professional employees forming "a homogeneous, clearly identifiable group with distinctive work interests" constitute an appropriate unit, with the finding that the technical employees alone constitute an appropriate unit, on the ground that the union failed to show interest among the professional employees, allowed the extent of organization of the affected employees to control the unit determination, in violation of Section 9(c)(5) of the Act.

3. Whether the Board violated Section 9(c)(1) of the Act, when it so replaced its Regional Director's finding, and whether the Court of Appeals' affirmance of the Board's order was contrary to Section 9(d) of the Act, since the union's failure to make a showing of interest did not constitute a part of the record of the Board's hearing.

Statutes, Rules and Regulations and Statements of Procedure Involved

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*), N. L. R. B. Rules and Regulations, Series 8, as amended (29 C. F. R. 102.1, *et seq.*), and N. L. R. B. Statements of Procedure, Series 8, as amended (29 C. F. R. 101.1, *et seq.*), are set forth in Appendix B, *infra*, pp. 48a-55a.

Statement of the Case

A. *The I. U. E.'s Petition.* On September 11, 1961 the I. U. E. filed with the National Labor Relations Board under Section 9(c) of the Act a petition which, as amended during the three-day hearing which the Regional Director held on October 2, 4 and 6, 1961, requested certification as bargaining representative for a unit composed of technical employees of the Employer's Thermo-Electric Division. (App. A, p. 23a).

B. *The Thermo-Electric Division and its Employees.* One of the Employer's plants is located at Newark, New Jersey. That plant houses the operations of three of the Employer's Divisions: the Automatic Manufacturing Division, the Semi-Conductor Division, and the Division here involved, the Thermo-Electric Division. (App. A, p. 36a).

The Thermo-Electric Division is a relatively small operation, employing 30-35 people, devoted to research and

development in the areas of thermo-electric and nuclear devices and phenomena. Its employees have no bargaining history. (App. A, p. 36a).

At the time the representation petition of the I. U. E. was heard, 32 employees worked in the Thermo-Electric Division; 17 of them were in "engineering" classifications and 15 were in "laboratory" classifications. (App. A, p. 37a). The work and the relationships of those 32 employees were the subject of considerable evidence, from which the Regional Director made detailed and undisputed findings, including the following:

(i) "All these [engineering and laboratory] employees work in the same general area, and all work in close collaboration as a team in the performance of their duties under the general supervision of Barmat [Division Manager]." (App. A, p. 41a).

(ii) "* * * employees in the engineering classifications perform every operation in the division and the laboratory employees at times perform work normally considered to be engineering work, such as heat transfer analysis, computer quoting, calculations of a complex nature, drafting and designing work and buying of parts and equipment." (App. A, p. 41a).

(iii) "* * * frequently, where more than one employee is required for an operation, an engineer and a technician work together jointly rather than two technicians or two engineers." (App. A, p. 41a).

(iv) "It is also a common occurrence to have senior engineers, senior technicians and laboratory technicians work side by side performing the same work." (App. A, pp. 41a-42a).

(v) "* * * all employees in the Thermo-Electric Division receive the same holidays, hospitalization and family death benefits. * * * All of the employees punch time clocks except the project engineers." (App. A, p. 41a).

(vi) "The foregoing establishes that the employees in the Employer's Thermo-Electric Division [both engineering and laboratory employees] constitute a homogeneous, clearly identifiable group with distinctive work interests * * *." (App. A, p. 42a).

C. *The Regional Director's Decision.* On the basis of his specific findings, which, additionally, included findings that the engineering employees were professional employees within the meaning of Section 2(12) of the Act and that the laboratory employees were not professional employees but were technical employees, the Regional Director decided that all the employees in the Thermo-Electric Division, both engineering and laboratory, constituted an appropriate bargaining unit. (App. A, pp. 42a-44a.)

In making his decision, the Regional Director relied specifically on *Reynolds Electrical & Engineering Company, Inc.*, 133 N. L. R. B. 113 (1961), a case similarly involving a group of professional and technical employees working as a "homogeneous, clearly identifiable group with distinctive work interests." (133 N. L. R. B. at 114). There, on the petition of the employer, following a demand for recognition by the union for a unit of technical employees only, the Board held that despite the union's desire to represent only the technical employees, the appropriate unit should include both professionals and technicals. The Regional Director here made the same determination.

D. *The Board's Decision on Review.* Following the I. U. E.'s Request for Review of the Regional Director's decision, the Board, on March 27, 1962, issued its Decision on Review, Order and Direction (App. A, *infra*, p. 32a), in which it noted "[t]here is no dispute as to the Regional Director's findings" (App. A, p. 33a), but rejected the unit of professionals and technicals found appropriate by the Regional Director because "the [I. U. E.] has no showing of interest among the professional employees," distinguishing the *Reynolds Electrical* case, *supra*, on the ground that the petitioner there was the employer and no showing of interest was required.

E. *Unfair Labor Practice Proceedings; Review by the Court of Appeals.* To secure review of the Board's unit determination, the Employer refused to bargain with the I. U. E. for that unit, and after the institution of unfair labor practice proceedings, the Employer, the I. U. E. and the Board's General Counsel, "to avoid unnecessary costs and delay," entered into a "Stipulation of Fact in Lieu of Hearing," waived hearing and oral argument before a Trial Examiner, the making of findings of fact and conclusions of law by a Trial Examiner, the issuance of an Intermediate Report and Recommended Order, and oral argument before the Board, and moved that the proceedings be transferred to the Board. (App. A, p. 22a) On September 25, 1962, the Board granted the parties' motion to transfer the case to the Board. (App. A, p. 22a)

On December 19, 1962, the Board issued its Decision and Order, noting that the Employer's defense to the unfair labor practice complaint "is concerned solely with the Board's unit determination" (App. A, p. 25a), and concluded, on the basis of its earlier determination in that

case, that the Employer had been guilty of an unlawful refusal to bargain with the I. U. E. as the exclusive representative of an appropriate unit of employees (App. A, p. 25a). It accordingly directed the Employer to bargain collectively with the I. U. E. with respect to that unit.

On December 26, 1962, the Employer filed its Petition for Review in the Court of Appeals. The Board filed a cross-petition for enforcement on February 6, 1963.

F. *The Decision Below; Rehearing Denied.* On June 3, 1963, the Court of Appeals entered its judgment denying the Employer's petition for review and granting the Board's cross-petition for enforcement.

The Court held that the Board had not violated Section 9(c)(5) of the National Labor Relations Act by giving controlling effect to the extent of organization in determining the appropriate unit, although the only reason advanced by the Board for replacing the unit of professionals and technicals found appropriate by its Regional Director by a unit composed only of technicals was that the I. U. E. had made "no showing of interest among the professional employees" (App. A, p. 33a). The Court also held that the Board's instant decision was not arbitrarily inconsistent with the Board's decision in the *Reynolds Electrical* case, 133 N. L. R. B. 113 (1961), because in *Reynolds*, the employer filed the representation petition, whereas in this case, the union filed the petition. Petition for rehearing was denied on July 17, 1963.

Reasons for Granting the Writ

1. In affirming and enforcing the determination of the Board that the composition of the appropriate unit for bargaining may properly depend on whether it was the employer or the union which filed the representation petition, the Court of Appeals has wrongly decided a question important in the administration of the National Labor Relations Act, which has not been, but should be, decided by this Court, and has permitted an arbitrary determination of unit appropriateness, contrary to the decisions of this Court.

Section 9(c)(1)(A) and (B) of the Act (App. B, *infra*, pp. 48a-49a), allows a petition to be filed either by a union, on the employer's declining to honor its claim as exclusive bargaining representative, or by an employer, on the union's presentation of such a claim. On the filing of a petition by either union or employer, the Board must investigate, provide for a hearing if it has reasonable cause to believe the petition presents a question of representation affecting commerce, and direct an election and certify its results if the record of the hearing shows that such a question exists. National Labor Relations Act §9(c)(1), 29 U. S. C. §159(c)(1). The Act prescribes but one manner for the Board to treat a petition, whoever files it.

The Board, in this case, however, despite a record which established that the Employer's professional and technical employees in the Thermo-Electric Division together constitute "a homogeneous, clearly identifiable group with distinctive work interests" (App. A, p. 42a), nevertheless found that the technical employees alone were a unit appro-

priate for bargaining purposes, because the petition for representation had been filed by the union, with a showing of interest in the technical employees alone. As to its own recent case of *Reynolds Elec. & Eng't Company*, 133 N. L. R. B. 113 (1961), on which the Board's Regional Director relied in finding a single unit of technicals and professionals appropriate, the Board recognized that it was necessary to try to distinguish it, and did so on the ground that, in *Reynolds*, the representation petition had been filed by the employer, and the union, therefore, had not been required to make a showing of interest. In *Reynolds*, however, the union also, like the union here, had sought a unit of technicals only, and in *Reynolds*, as here, the record showed that the technicals were but part of a department and that they, together with professionals, constituted a "homogeneous" unit.

In the face of these indistinguishable facts, the Board here did what it refused to do in *Reynolds*: it found that the technicals, alone, constitute an appropriate unit. It did this, not on any showing or finding that the technical employees were not homogeneously related to the professionals, but simply and solely on its assertion that *Reynolds* was distinguishable because there the employer filed the petition. In other words, the Board here excluded the professionals from an otherwise appropriate unit, and found the truncated, and otherwise inappropriate unit, appropriate because the union, in filing its petition, had not made any showing of interest in the professionals. That ground for determination of appropriateness of unit *differs radically* from the Board's method of decision in previous cases in which unions had filed petitions, with no showing of interest in professionals. In those cases in which the Board

found a unit of non-professionals appropriate, it did so on the basis of the record facts as to those employees, not because it excluded the professionals from a homogeneous, appropriate unit. *Tele-Dynamics Div., American Bosch Arma Corp.*, 132 N. L. R. B. 748 (1961); *DIFCO Laboratories, Inc.*, 129 N. L. R. B. 887 (1960); *Vickers, Inc.*, 124 N. L. R. B. 1051 (1959); *Liggett Drug Co.*, 110 N. L. R. B. 949 (1954).

The Court of Appeals approved the Board's arbitrary method of finding appropriateness in the remnant of a homogeneous group by excluding the professionals who were integrated in the work of that group, by saying that "*Reynolds* is factually distinguishable. In *Reynolds* the employer filed the petition." The Court of Appeals did not attempt to say, any more than the Board did, that *Reynolds* was distinguishable because in *Reynolds*, the technical employees were part of a homogeneous group, whereas in this case, they were not. Neither Court nor Board could say that because the record conclusively shows otherwise. The only "factual" distinction the Court could find was that the employer filed the petition in *Reynolds*, and the union filed the petition here.

The Court of Appeals went on to justify the Board's right to require a showing of interest by the union in a union petition case while not making a similar requirement in an employer petition case. Petitioner did not, however, challenge that right below and does not do so here. What petitioner does challenge is the Board's right, as affirmed by the Court of Appeals, to use the union's showing of interest as the reason for deciding that the unit in which the union is interested is appropriate, while, at the same time, it decides in a case indistinguishable on its facts,

that a similar unit is inappropriate, and justifies both decisions on the sole ground that, in the latter case, its procedures did not require any showing of interest.

Showing of interest is evidence, usually in the form of signed cards, that employers have authorized the union to represent them. Sometimes termed "evidence of representation" in the Board's Statements of Procedure (Secs. 101.17, 101.18(a), App. B, *infra*, p. 54a), showing of interest is required of a union petitioner,

> "it being the Board's administrative experience that in the absence of special factors the conduct of an election serves no purpose under the statute unless the petitioner has been designated by at least 30 percent of the employees." (App. B, p. 54a)

It is not required of an employer petitioner. (App. B, pp. 54a-55a)

Showing of interest, then, heretofore has had but a single and circumscribed function. In union petition cases only, it is used

> "to enable the Board to determine for itself whether or not further proceedings are warranted, and to avoid needless dissipation of the Government's time, effort and funds." *O. D. Jennings & Company*, 68 N. L. R. B. 516, 518 (1946).

Using lack of adequate showing of interest as ground for not directing an election in a unit which hearing has shown to be appropriate is one thing. The Board does it frequently, in cases where the unit it finds appropriate is larger than or substantially different from the unit initially sought by the union. In such cases, the Board either permits the union to withdraw its petition, or allows

the union a set time within which to establish a sufficient showing of interest or suffer its petition to be dismissed. N. L. R. B. Twenty-Seventh Annual Report (1962), p. 45.

Using lack of showing of interest, not as ground for not directing an election in a unit found appropriate, but as ground for giving the union an election in a smaller, otherwise inappropriate, unit, is quite another thing. That involves use of the showing of interest requirement to *determine* the unit in which to direct an election, a function it may not properly serve.

The double standard which the Board has loosed in this case could materially affect the outcome of the large numbers of cases, arising under Section 9(c) of the Act, in which the Board is called upon to exercise its Section 9(b) duty to decide appropriate units.* The decision of the Court of Appeals, moreover, does not indicate which standard the Board will apply in a case initiated by a union petition, and followed by an employer petition. Any rule of decision of appropriateness of units which depends on the arbitrary factor of the identity of the petitioner and, in the case of union petitions, arbitrarily permits a finding of appropriateness as to a unit otherwise inappropriate because only part of a homogeneous whole, is contrary to the decisions of this Court that a Board unit determination may not stand if it is arbitrary. *Packard Motor Car Co.* v. *NLRB*, 330 U. S. 485, 491-2 (1947); *May Dep't Stores Co.* v. *NLRB*, 326 U. S. 376, 380 (1945).

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* In the fiscal year ended June 30, 1962, the Board and its Regional Directors determined the appropriate unit in 1939 union petition cases and 119 employer petition cases filed under Section 9(c)(1)(A) and (B), respectively. N. L. R. B. Twenty-Seventh Annual Report (1962), p. 272.

2. In affirming and enforcing the Board's decision that, because it excluded the professionals from the unit, the technical employees alone constituted an appropriate unit, although the record, without dispute, shows homogeneity of professionals and technicals, such exclusion by the Board being based solely on the lack of showing of interest by the union, the Court of Appeals not only allowed extent of organization to be controlling, contrary to Section 9(c)(5) of the Act, but affirmed the Board's decision on an erroneous statement that the Board had made findings which it did not make, and thus so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision.

The Court of Appeals answered the Employer's contention that the Board, in deciding that a unit of technical employees alone was appropriate, had given controlling effect to the extent of organization achieved by the I. U. E., by saying:

> "In reversing the decision of the Regional Director, the Board indicated that it was giving consideration to the union's unwillingness to represent the professionals and to the fact that there was no 'showing of interest' among the professionals for representation by the union. It is claimed that in so doing the Board violated §9(c)(5) of the Act, 29 U. S. C. A. §159(c)(5), by giving controlling effect to the extent to which the employees had organized. If it were true that these reasons were the sole basis for the Board's decision, a serious question as to the validity of the Board's order would result. *N. L. R. B.* v. *Glen Raven Knitting Mills, Inc., supra*; *N. L. R. B.* v. *Jones & Laughlin Steel Corp.*, 331 U. S. 416, 422-423 (1947); *Allis-*

Chalmers Mfg. Co. v. *N. L. R. B.*, 162 F. 2d 435, 439 (7 Cir. 1947). We think the record indicates that the Board did apply proper reasons in deciding the issue. The courts have often held that although the extent of organization may not be controlling, it may be a factor; e.g., *N. L. R. B.* v. *Quaker City Life Insurance Co.*, —— F. 2d —— (4 Cir. 1963), and cases therein cited."

The Board's Decision, however, makes it clear that the Board had not simply given "consideration" to the union's unwillingness to represent the professionals and to its lack of showing of interest among them. The Board's Decision (App. A, p. 33a) says:

> "It is clear that the Petitioner seeks to represent only the technical employees and does not desire to represent the professionals. Moreover, where as here, the Petitioner has no showing of interest among the professional employees, the Board will not direct an election among them to ascertain whether they wish to be joined in the same unit with non-professionals. In these circumstances, we find that the requested unit limited to the technical employees is appropriate * * *."

These words can mean only that the Board did not merely give consideration to the union's lack of interest in the professionals, but *because* of that lack of interest, severed the professionals from the single homogeneous unit of professionals and technicals and found the remaining segment appropriate. No other reason appears in the Board's decision to explain why the severed technical employees were an appropriate unit. The reasons of lack of interest and unwillingness to claim representation rights *were* the "sole basis for the Board's decision" and, therefore, as the Court of Appeals recognized, "a serious ques-

tion as to the validity of the Board's order would [and does] result." (App. A, p. 19a)

Having asserted that the Board applied proper reasons in deciding the issue of appropriateness, despite the fact that no such reasons appear in the Board's decision, the Court of Appeals then makes explicit the reasons which it had in mind. The Court starts by saying that "[n]one of the parties in the case have questioned the correctness of the Regional Director's findings of the basic historical facts * * *" and that "the evidence conclusively supports them" (App. A, p. 19a). Those basic findings compelled the Regional Director to conclude that the professional and technical employees constitute a homogeneous unit and to reject the I. U. E.'s request for a unit comprised only of the technical employees.

The Regional Director did not, as the Court of Appeals' opinion says, make a "choice" (App. A, p. 20a) of the larger unit; in determining the mixed unit to be appropriate, in the face of the union's desire for a unit of technical employees only, he necessarily rejected the appropriateness of such a smaller unit. Nor did he, as the Court of Appeals' opinion says, make an "alternative decision that a unit of the technicals alone would be an appropriate unit" (App. A, p. 20a). The Regional Director, following the Board's own decision in the *Reynolds* case, *supra*, 133 N. L. R. B. 113 (1961), found that a unit of technical employees alone would be appropriate only if the professionals voted against inclusion in the appropriate unit of professional and technical employees (App. A, p. 46a).

In its efforts to supply a proper foundation for the Board's decision which does not exist, the Court of Appeals said that "[t]he Board's opinion * * * clearly though im-

pliedly adopts" "the Regional Director's findings of the basic historical facts" (App. A, pp. 19a-20a, 19a), and also says that the Board's decision "is amply supported by the findings of fact made and the reasons relied upon by the Director to support his alternative decision that a unit of the technicals alone would be an appropriate unit" (App. A, p. 20a).

We have already seen that the Regional Director made no such alternative decision, and it is clear that neither he nor the Board made any findings to support such a putative alternate decision. Another part of the Court of Appeals' opinion shows the findings which it thought necessary to support the Board's order were that "[t]he technicals are sufficiently cohesive as a unit and at the same time sufficiently distinct from the professional engineers to permit separate bargaining units", and that "sufficient distinctions between the technicals and the professionals exist to support a separation" (App. A, p. 18a). The insuperable difficulty with the Court's holding that the Board adopted such findings as among those made by the Regional Director is not only that the Regional Director did not make any such findings, but that he found precisely the opposite. He found that "the employees in the Employer's Thermo-Electric Division constitute a homogeneous, clearly identifiable group with distinctive work interests" (App. A, p. 42a), in short, that sufficient distinctions do *not* exist to support a separation.

Without any findings of the kind which the Court of Appeals said were necessary to support the Board's order, we are thrown back to the reason which the Board itself gave for its decision: that, "[i]n these circumstances"—*i.e.*, that the I.U.E. "seeks to represent only the technical

employees" and "has no showing of interest among the professional employees"—"we find that the requested unit limited to the technical employees is appropriate" (App. A, p. 33a). "Showing of interest" is but a way to write "extent of organization" which Section 9(c)(5) of the Act provides shall not control a unit determination. A union shows interest by supplying to the Board evidence that employees have authorized it to represent them. It can hardly supply such evidence for employees whom it has not organized. Interest, in a word, is organization.

When, thus, the Board invokes the I.U.E.'s failure to show interest among the professionals as reason to reject the Regional Director's finding that they, together with the technicals, constitute an appropriate unit, its determination is being controlled by extent of organization. This hardly veiled reliance on extent of organization is not unprecedented in the history of the Act's administration. Indeed, overt reliance by the Board on that fact was noted by Congress in the deliberations leading to inclusion of Section 9(c)(5) in the Labor Management Relations Act, 1947:

> "Section 9(f)(3) [identical to present Section 9(c)(5)] strikes at a practice of the Board by which it has set up as units appropriate for bargaining whatever group or groups the petitioning union has organized at the time. Sometimes, but not always, the Board pretends to find reasons other than the extent to which the employees have organized as ground for holding such units to be appropriate (*Matter of New England Spun Silk Co.*, 11 N. L. R. B. 852 (1939); *Matter of Botany Worsted Mills*, 27 N. L. R. B. 687 (1940)). While the Board may take into consideration the extent to which employees have organized, this evidence

> should have little weight, and as section 9(f)(3) provides, is not to be controlling." H. R. Rep. No. 245, 80th Cong., 1st Sess. 37 (1947).

The Court of Appeals, in affirming the Board's order, necessarily sanctions the Board's present overt and explicit reliance on extent of organization as the only and, therefore, controlling reason for eliminating the professionals from a homogeneous unit. The efforts of the court below to establish other findings and reasons for the Board's decision which do not appear, and cannot be read into the Board's decision, is such a departure from the usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. For, by finding different and non-existent grounds for the Board's decision, the Court of Appeals has effectively made a nullity of the statutory right of judicial review of such Board orders and, after the event, deprived the Employer of any opportunity to challenge, before the Board, the findings which the Court says the Board made, for the simple reason that the Board never made them.

3. In affirming and enforcing the Board's order which was in fact based upon the lack of a showing of interest among the professionals by the union, the Court of Appeals has permitted a matter which is not in the record of the hearing to furnish a basis for the Board's decision, contrary to Sections 9(c)(1) and 9(d) of the Act, and has thus again so far departed from the usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Nothing is more clear than that the Board now uniformly refuses to include the matter constituting a union's showing of interest in the record of its hearings on representational matters; nor will the Board give an employer access to that evidence or opportunity to litigate its nature or sufficiency. See, *e.g., O. D. Jennings & Co.*, 68 N. L. R. B. 516, 517-8 (1946); *S. H. Kress & Co.*, 137 N. L. R. B. 1244, 1248 (1962). This treatment of showing of interest has been consistently upheld by the courts. *NLRB* v. *National Truck Rental Co.*, 239 F. 2d 422 (D. C. Cir. 1956), *cert. den.*, 352 U. S. 1016 (1957); *NLRB* v. *White Constr. & Eng'r Co.*, 204 F. 2d 950 (5th Cir. 1953); *NLRB* v. *J. I. Case Co.*, 201 F. 2d 597 (9th Cir. 1953); see *Kearney & Trecker Corp.* v. *NLRB*, 209 F. 2d 782 (7th Cir. 1953).

In *Kearney & Trecker*, *supra*, the Court denied an employer's motion to expand the record of the case to include showing of interest evidence because Section 9(d) of the Act required the Board to certify only the hearing record, which the court held did not include that evidence. The court said that if it had granted the motion, the inclusion of the showing of interest evidence

> "would undoubtedly be met by a successful challenge that the Board had exceeded its authority and that

> the petitioner had been deprived of due process because the Board had taken into consideration matters developed in the preliminary investigation, to which the petitioner was not a party and in which it had no opportunity to be heard." 209 F. 2d 782, at 787.

Since it clearly appears from the Board's decision herein that it based its determination on the lack of showing of interest—and, for purposes of Section 9(c)(1), it does not matter whether the Board's reliance was controlling or only partial—there would appear to be no doubt that the court below permitted the Board's decision, and its own decree, to rest in part on matter not in the record of the hearing, contrary to Sections 9(c)(1) and 9(d) of the Act. Petitioner has no way of knowing whether the I. U. E. in fact made no showing of interest as to the professional employees or whether initially such a showing was made and perhaps withdrawn. It is for these reasons that the court in *Kearney & Trecker, supra*, said that inclusion of showing of interest evidence in the record "would undoubtedly be met by a successful challenge that the Board had exceeded its authority and that the petitioner had been deprived of due process" because of the Board's reliance on matters as to which no opportunity to be heard had been afforded to the employer.

In permitting the Board to rely upon showing of interest evidence as a factor in its decision of appropriateness of unit, the Court of Appeals has, for the very reasons given by the court in *Kearney & Trecker*, deprived petitioner of due process. Such a departure from the usual course of judicial proceedings calls for the exercise of this Court's power of supervision.

Conclusion

For the reasons stated it is respectfully submitted that this petition for a writ of certiorari should be granted.

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Respectfully submitted,

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